Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

NO. 76-65

REPUBLICAN PARTY OF
SHELBY COUNTY, TENNESSEE,
APPELLANT,

vs.

ROSCOE DIXON, WILLIAM OWENS, CLYM CROSS, LILA CROSS, PATRICIA MAYWEATHER, and RONALD K. HOOKS, Individually on behalf of themselves and all other resident citizens and qualified electors of the State of Tennessee, and SHIRLEY HASSLER, Coordinator of Elections, ANN WELDON, JACK H. MORRIS, III, LEAH V. ABBOTT, PAT JOYNER, and WILLIAM L. AUSTIN, Shelby County Election Commissioners; and
THE COMMITTEE FOR THE PRESERVATION OF THE SEVENTH CONGRESSIONAL DISTRICT,
APPELLEES.

On Direct Appeal from the United States Three-Judge District Court for the Western District of Tennessee, Western Division

MOTION TO AFFIRM

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vs.

ROSCOE DIXON, WILLIAM OWENS, CLYM CROSS, LILA CROSS, PATRICIA MAYWEATHER, and RONALD K. HOOKS, Individually on behalf of themselves and all other resident citizens and qualified electors of the State of Tennessee, and SHIRLEY HASSLER, Coordinator of Elections, ANN WELDON, JACK H. MORRIS, III, LEAH V. ABBOTT, PAT JOYNER, and WILLIAM L. AUSTIN, Shelby County Election Commissioners; and
THE COMMITTEE FOR THE PRESERVATION OF THE SEVENTH CONGRESSIONAL DISTRICT

ON DIRECT APPEAL FROM THE UNITED STATES THREE-JUDGE DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, Appellee moves to affirm the judgment of the District Court.

STATEMENT

This case concerns a determination of whether the Courts should involve themselves further in the legislative process of apportioning congressional districts. The appeal was taken from the decision of the court below to reapportion the congressional districts using the 1970 decennial census as the population measurement basis.

The Appellant's statement of the questions presented by the appeal is inaccurate, at least in part. First, the question of whether the District Court was, as a matter of law, confined to the 1970 Decennial Census population figures is a valid question involved herein. However, the other two stated questions found on pages 5 and 6 of the Jurisdictional Statement are inaccurate. First, the adjective "official" does not apply to the estimates of population sought to be used by the appellant. Second, the estimates sought to be used are subcounty estimates which are, as admitted by the Appellant's own witness, inaccurate. (See Deposition of Francese)

(1) The judgment of the three-judge District Court should be affirmed because the Court was confined, as a matter of law, to using the 1970 decennial census as the measurement of population for reapportionment. The Court found Tennessee Code Annotated § 2-1603, as applied to the wards and precincts of Shelby County, Tennessee, to be an unconstitutional division of population. That decision was based upon measurement of the population according to the 1970 United States Decennial Census, as interpolated by the

Memphis and Shelby County Planning Commission, the same being *stipulated* by the parties and found to be "the most accurate figures available and controlling" by the District Court.

(2) Not only was the District Court's decision based upon an accurate *factual* determination but is required in order to prevent unwarranted judicial intervention in what is primarily a legislative policy consideration. At the outset, it should be recognized that the challenge to the constitutionality and the District Court's determination of the unconstitutionality of Tennessee's apportionment statute dealt only with *division* of population and not with the legislatively determined method of population *enumeration*.

At no time has there been any challenge to the constitutionality of Tennessee Code Annotated, § § 2-1602, 2-238, 2-303, or 2-309 which are the statutory enactment of the Tennessee General Assembly's selection of the method of enumerating population for apportionment purposes. The only statute challenged below was § 2-1603, the statute that divided population already enumerated.

Moreover, the position advocated by the Appellant opens an ever continuing "Pandora's Box" of neverending court reevaluation of methods for determining population for apportionment purposes, totally destroying any vestige of stability in the legislative process. Thus, it is submitted:

(1) The choice of the method of population determination is a legislative function;

(2) The state legislature is free to choose any reasonable method of population measurement;

(3) The General Assembly of Tennessee has unequivocally chosen the federal decennial census as the method for measuring population for the purposes of apportioning Representatives among various districts;

(4) The method chosen is a constitutionally legitimate legislative policy determination;

(5) No cogent reason exists for any deviation from this legislative decision; and

(6) The "estimates" proposed by Appellant violate the constitutional and statutory requirements of an "enumeration" or "count" of population and imposes instead an inaccurate guessing game based upon invalid premises.

ARGUMENT

In dealing with the apportionment of Representatives among the States, the United States Constitution speaks through Art. I, § 2, Cl 3, which provides in pertinent part:

> *Representatives . . . shall be apportioned among the several states . . . according to their respective numbers . . . . The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and in every subsequent term of ten years, in such manner as they shall by law direct. (Emphasis added.)*

and Amendment XIV, § 2 which provides:

> *Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. (Emphasis added.)*

At the outset, it is clear that the Constitution provides that Representatives shall be apportioned according to an "enumeration" or "counting" of the persons who inhabit the various states. While the purpose of the above constitutional provisions was to provide for the apportionment of the Representatives, the right which is protected is *the right to vote* as established by the laws and constitution of the individual states. *Lassiter v. Northampton County Board of Elections*, 360 U. S. 45 (1959).

The Constitution requires that in order that Representatives be properly apportioned among the various states, there must be an "enumeration" or "counting" of the people. Congress, in carrying out these constitutional mandates, has provided that the decennial census be used as the method of population determination. 2 U.S.C. § 2(a). Upon the determination of population by the use of the said census, the Representatives are apportioned *among* the various states. These provisions, constitutional and statutory, deal with apportionment *among*, not *within*, the states. *Meeks v. Avery*, 251 F. Supp. 245 (E. D. Ks. 1966).

The method of apportioning the state's number of Representatives within the state among its internal

population is primarily a legislative function. *White v. Weiser*, 412 U. S. 783, 784 (1973). It follows logically, therefore, that the method of determining population figures by which this internal apportionment is to be effected is likewise a legislative function. While the equal protection clause requires that the value of one man's vote in a congressional election be worth, as nearly as is practicable, that of another, *Baker v. Carr*, 369 U.S. 188 (1962); *Westberry v. Sanders*, 376 U.S. 1, 9 (1964), the actual method by which this is to be effected is left to the states. See *Preisler v. Sec. of State of Missouri*, 257 F. Supp. 953 (D. Mo. 1966), aff'd 385 U.S. 450. This approach is entirely consistent with the idea that "reapportionment is primarily a legislative consideration," as recognized by this Court in *White v. Weiser, supra*, and by the District Court in its *per curiam* opinion of December 26, 1974. While the Tennessee legislature failed to act pursuant to its constitutional responsibility to reapportion the constitutionally invalid Districts, it must be remembered that the invalidity lay in the *division* of the population into districts, not in the method of enumeration of the population itself. The intervention of the District Court was necessary only in dividing the *enumerated population* into properly apportioned districts, *Long v. Avery*, 251 F. Supp. 541 (1966), not in redetermining the method of measurement of the population itself.

The General Assembly of Tennessee has chosen the federal enumeration of population in the decennial census as the basis for apportionment of its representatives among the districts within the state. This is evident from a cursory reading of Tennessee

Code Annotated, §§ 2-238, 2-303, 2-309, and 2-1602:

2-238. Preparation of periodic lists of newly registered voters in counties having a population in excess of 180,000 — Public purchase. —

In counties of this state having a population in excess of one hundred eighty thousand (180,000), according to the United States census of population of 1970, or any subsequent United States census of population, it shall be the duty of the commissioners of elections to prepare or cause to be prepared each month a listing, by voting precinct, of all persons registered to vote in each precinct during the preceding month. . .

(Acts 1972 (Adj. S.), ch 675, §1) (Emphasis added.)

2-303. Maximum size of precincts. — Precincts where voting machines are used shall, whenever practicable, in the judgment of the county election commission, after taking into consideration all facts and circumstances, be limited in size to a maximum of three thousand (3,000) registered voters, provided, however, that in counties having a population of over seven hundred thousand (700,000) by the 1970 federal census or any subsequent federal census, no precinct where voting machines are used may exceed three thousand (3,000) registered voters. (Acts 1972 (Adj. S.), ch. 740, § 1; 1974 (Adj. S.), ch. 413; § 1; 1974 (Adj. S.), ch. 676, § 1.) (Emphasis added.)

2-309. General assembly members, congressional representatives, presidential electors, governor and public service commissioner — Time for elections. — Elections for the following offices shall be held at the regular November election when the election immediately precedes the commencement of a full term:

(a) Representative in the general assembly;

(b) Representative in the United States congress;

(c) . . . (Acts 1972 (Adj. S.), ch. 740, § 1.) (Emphasis added.)

2-1602. Establishment of congressional districts. — The general assembly shall establish the composition of districts for the election of members of the house of representatives in congress after each enumeration and apportionment of representation by the congress of the United States. The districts may not be changed between apportionments. (Acts 1972 (Adj. S.), ch. 740, § 1.) (Emphasis added.)

These statutory enactments of the Tennessee legislature indicate the legislature's valid desire to establish political stability in apportioning the state's representatives. Tennessee Code Annotated, § 2-1602. The intent of the Tennessee legislature was to establish that the "count" or "enumeration" to be used in the

determining of the composition of the various districts within the state was to be that count obtained by United States Census of Population of 1970, or any subsequent United States Census of Population, the same method chosen by Congress for measuring population for apportionment among the states. Therefore, the Tennessee legislature, while not effecting a reapportionment plan pursuant to the directions of the District Court in its *per curiam* opinion of December 26, 1974, nevertheless clearly determined the method for counting the people in order to determine the composition of the various districts under any apportionment plan. This method was not found to be unconstitutional by the Court below. [1]

The choice of the Tennessee legislature to use the decennial census as the measuring basis is reasonable and proper. *Chavis v. Whitcomb*, 307 F. Supp. 1362 (S. D. Ind. 1969); *Grills v. Branigan*, 284 F. Supp. 176 (S. D. Ind. 1968). [2] In both of these cases, the court approved

(1) As stated above, the only statute found to be unconstitutional was Tennessee Code Annotated, § 2-1603. The other various statutes, §§ 2-1602, 2-309, 2-303, and 2-238 were not challenged. Only the division statute was challenged, not those determining the method of enumeration.

(2) The United States Supreme Court, in the joint cases of **Branigan v. Duddleston** and **Summers v. Duddleston,** 391 U.S. 364 (1968), affirmed the decision in **Grills v. Branigan.** The **Grills v. Branigan** case found in 284 F. Supp. is the decision of the Indiana District Court, a three judge panel, rendered upon the remand as a result of the reversal of the decision of that Court in **Grills v. Branigan,** 255 F. Supp. 155 (S. D. Ind. 1967) by the Supreme Court in **Duddleston v. Grills,** 385 U.S. 455 (1967). The District Court, in both cases, determined that the correct basis for reapportionment was the use of the 1960 Federal Decennial Census. This Honorable Court affirmed this second position by its memorandum decision in the above referenced twin cases.

the use of the decennial census, even though outdated, in considering redistricting in Indiana. The three judge court stated:

> *The Census of 1960 must be tolerated until the next official census in order to maintain relative political stability. Grilis v. Branigan, 284 F. Supp. 176.*

A consideration of the Indiana statutes then in effect evidences that the Indiana legislature, like that of Tennessee, used the federal census as its basis for population measurement. Compare Chapter 205, § 1, 1965 Acts of the Indiana General Assembly, Chapter 261, § 9, 1965 Acts of Indiana General Assembly with Tennessee Code Annotated, §§ 2-238, 2-303; 2-309; 2-1602. Thus, the District Courts in *Chavis* and *Grills*, both *supra*, were bound to use the same population measurement as dictated by the legislature.

Clearly, the Tennessee legislature, as well as Indiana's, could have chosen another method to measure population. For example, the use of impartial and accurate population estimates, *Exon v. Tiemann*, 279 F. Supp. 609 (D. Neb. 1968), [3] or the use of "any available population figures they can muster," *Wells v.*

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(3) The earlier **Exon** case, **Exon v. Tiemann**, 279 F. Supp. 603 (1967) found the **division** of population unconstitutional in that it created impermissible population variances. However, there was no rejection of the use of the federal census as the method of population determination. In **Exon II**, the legislature chose to use estimates. 279 F. Supp. at 611. The Court did not use estimates to redistrict.

Rockefeller, 273 F. Supp. 984, 991 (S.D.N.Y. 1967), were open to use by the Tennessee legislature. See also, *Meeks v. Avery*, 251 F. Supp. 245 (E.D. Ks. 1966), where the Kansas legislature used a state census as the method of enumeration. However, the Tennessee legislature chose the decennial census as the measuring basis. Having done so, the District Court below was foreclosed, as was the Southern District Court of Indiana, from substituting another basis for measurement. The choice of method of determination of population basis is an "exercise of judgment in the legislative process." *Meeks v. Avery, supra* at 250. To invade this province would substitute unwarranted judicial intervention for valid legislative policy determinations. This Honorable Court has unequivocally rejected such intervention in reapportionment cases:

> *Just as a federal district court, in the context of legislative reapportionment, should follow the policies and preference of the state, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution, we hold that a district court should similarly honor state policies in the context of congressional reapportionment. White v. Weiser, supra, 412 U. S. at 795. (Emphasis added.)*

The District Court properly should have proceeded no further than was required to formulate a constitutionally sufficient apportionment plan consistent

with the policy determinations of the Tennessee legislature. *Chapman v. Meier,* 372 F. Supp. 371 (D.N.D. 1974). To abrogate Tennessee's choice of using the decennial census would be to "intrude upon state policy" more than is necessary. *Whitcomb v. Chavis,* 403 U.S. 124, 160 (1971). [4]

The Appellant's reliance upon the Court's language in *Kirkpatrick v. Preisler,* 394 U.S. 526 (1969), indicating that *States* "may properly consider" population shifts that "can be predicted with a high degree of accuracy", is misplaced. That States may consider accurate estimates is not tantamount to allowing courts to supplant valid legislative policy determination as Appellant advocates. [5]

Chavis v. Whitcomb, 307 F. Supp. 1362 (S. D. Ind. 1969), was the state legislative apportionment companion case with *Grills v. Branigan.* In dealing with the equal protection clause, the District Court of Indiana again used the 1960 Census even though outdated. The Court found that the state legislature was not properly apportioned. This Honorable Court in *Whitcomb v.*

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(4) Further, it should be remembered that the figures as to population (pursuant to the 1970 census as interpolated) have been stipulated herein. It was upon these figures that the District Court found malapportionment in the first instance. To use other figures at the present stage of these proceedings is tantamount to a suggestion that the District Court's prior decision of malapportionment was founded upon an improper premise.

(5) Contrary to Judge Brown's opinion below, there is no indication in **Kirkpatrick v. Preisler** that Courts may use estimates where the legislature has determined otherwise. Both the majority and the concurring refer to the "State" use of census modifications, if accurate.

Chavis, 403 U. S. 124 (1971), reversed the District Court's finding that there had been invidious discrimination against racial groups. The Supreme Court cited the 1960 Census figures as the figures to use in apportioning the legislature, 403 U.S. at 161. In *Kirkpatrick v. Preisler,* 394 U.S. 526, 528 (1969), the Supreme Court determined that the "best population data" was the 1960 Federal Decennial Census for the apportionment of the congressional districts in the State of Missouri. [6]

It is the position of the Appellee that while the legislature of the State of Tennessee is left to choose whatever method of measurement of population figures it will, once it has chosen the method, the Courts are bound to that method so long as it is reasonable. The Supreme Court by its affirmance in *Branigan v. Duddleston* and *Summers v. Duddleston, supra,* and by its language in *Kirkpatrick v. Preisler, supra,* has indicated the acceptance of the Federal Decennial Census as a reasonable reapportionment population basis.

Finally, it is respectfully submitted that the "estimates" of the intervening Republican Party are just that — inaccurate, inexact, unofficial, partial estimates. They are not "enumerations" or population "counts" upon which the equal protection right to equal worth of a vote at the polls can be based. For one

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(6) Surely the equal protection clause gives as much protection to the value of one person's vote, if not more (since it deals with voting in a qualitative as well as a quantitative sense) as does Article 1, § 2.

example, the estimates are based, in part, on telephone and automobile figures. Use of these figures automatically excludes consideration of the poor who have no telephone or automobile and increases the vote value of those who are prosperous enough to have one, two, three or more of these luxuries.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

RESPECTFULLY SUBMITTED this 28th day of September, 1976.

TUAL, GORDON, TUAL & RILEY

BY: J. Houston Gordon

J. HOUSTON GORDON
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CERTIFICATE OF SERVICE

I, J. Houston Gordon, hereby certify that I have this 28th day of September, 1976, caused to be served upon: Mr. Jerome M. Hoffman, Attorney-At-Law, Suite 1234, 100 North Main Building, Memphis, Tennessee 38103, Mr. Alex B. Shipley, Jr., Assistant Attorney General, Supreme Court Building, Nashville, Tennessee, and Mr. Lewis R. Donelson and Mr. Robert Walker, Attorneys-At-Law, Suite 2020, First National Bank Building, Memphis, Tennessee 38103, a true and exact copy of the foregoing Motion to Affirm, properly addressed and with sufficient postage affixed thereto.

J. Houston Gordon

J. HOUSTON GORDON